Office-Supreme Court, U.S.
FILED
JUL 12 1982
ALEXANDER L. STEVAS,
CLERK

82-61
No. A-909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

BOARD OF EDUCATION OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

ALLAN G. BARCLAY, GERALD K. BRAZNELL, AND GERALD B. HANSEN, DIRECTORS OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

Petitioners,

v.

TERRI ANN MIENER, By and through her next friend and parent, Clyde J. Miener,

and

STATE OF MISSOURI, *et al.*,

and

THOMAS E. SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BURTON M. GREENBERG
LONDON, GREENBERG & FLEMING
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102
(314) 231-8700
Counsel for Petitioners

July, 1982

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether the Court of Appeals contravened relevant decisions of this Court in holding that a special public school district which receives federal funds under the Education for All Handicapped Children Act of 1975 (EAHCA) can be sued for damages under the implied right of action in Section 504 of the Rehabilitation Act of 1973 and under the Civil Rights Act of 1871, 42 U.S.C. § 1983, by a handicapped child alleging wrongful exclusion from the district's programs, when no recovery of damages is possible under the express remedy provided in EAHCA.

2. Whether the Court of Appeals correctly applied this Court's decisions in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and *Mt. Healthy City School District* v. *Doyle*, 439 U.S. 274 (1977), in holding that a special school district which receives federal funds under EAHCA and whose sole functions are the education of handicapped children and the providing of vocational education does not share the State's Eleventh Amendment immunity from suit for damages regarding the district's provision of education to the handicapped.

LIST OF ALL PARTIES

1. Special School District of St. Louis County, Missouri; Board of Education of Special School District of St. Louis County, Missouri; and Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District of St. Louis County, Missouri.

Burton M. Greenberg
London, Greenberg & Fleming
100 North Broadway, Suite 1600
St. Louis, Missouri 63102
Attorney for Special School District Petitioners

2. Terri Ann Miener, by and through her next friend and parent, Clyde J. Miener.

Steven L. Leonard
Guilfoil, Symington, Petzall & Shoemake
100 North Broadway
St. Louis, Missouri 63102
Attorney for Plaintiff-Respondent Miener

3. State of Missouri, and Joseph P. Teasdale, Governor; Department of Elementary and Secondary Education of the State of Missouri, Arthur L. Mallory, Commissioner of Education of the Department of Elementary and Secondary Education of the State of Missouri; Dr. Leonard Hall, Assistant Commissioner of Education, Division of Special Education of the Department of Elementary and Secondary Education of the State of Missouri; Department of Mental Health of the State of Missouri, Joe L. Winter, Commissioner of the Department of Mental Health of the State of Missouri; Paul R. Ahr, Acting Director of the Department of Mental Health of the State of Missouri; Mr. John Twiehaus, individually and in his official capacity as the Acting Superintendent of the St. Louis State Hospital; and Dr. Milton Fujita, individually and in his former official capacity as Medical Director of the Youth Center of the St. Louis State Hospital; and the Missouri State Board of Education.

The Honorable John Ashcroft,
Attorney General
Robert Presson,
Leslie Ann Schneider,
Assistant Attorneys General
State of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

Simon Tonkin
Assistant Attorney General
State of Missouri
705 Olive Street, Suite 1323
St. Louis, Missouri 63101

Leo M. Newman
Newman & Bronson
1015 Locust Street, Suite 728
St. Louis, Missouri 63101

Attorneys for State Defendants-Respondents.

Carl I. Katzen
4372 Casa Brazilia Drive
St. Louis, Missouri 63129
Attorney for Heritage Insurance Company
insurer of Department of Mental Health
of the State of Missouri.

4. Thomas E. Smith, (former) Superintendent of Schools of the Special School District of St. Louis County

520 Spring Meadow Drive
Manchester, Missouri 63011

5. American Civil Liberties Union of Eastern Missouri, Amicus Curiae.

L. Steven Goldblatt
7777 Bonhomme
St. Louis, Missouri 63105
Attorney for Amicus Curiae.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Constitutional Provision, Statutes and Regulations Involved	3
Statement of the Case	4
Reasons for Granting the Writ:	
I. The Court of Appeals contravened relevant decisions of this Court in holding that a special public school district which receives federal funds under the Education for All Handicapped Children Act of 1975 (EAHCA) can be sued for damages under the implied right of action in Section 504 of the Rehabilitation Act of 1973 and under 42 U.S.C. § 1983 by a handicapped child alleging wrongful exclusion from the district's programs, when no recovery of damages is possible under the express remedy provided in EAHCA	9
II. The Court of Appeals incorrectly applied this Court's decisions in *Edelman* v. *Jordan* and *Mt. Healthy City School District* v. *Doyle* in holding that a special public school district which receives federal funds under EAHCA and whose sole functions are the education of handicapped children and the providing of vocational education does not share the State's Eleventh Amendment immunity from suit for damages regarding the district's provision of education to the handicapped	18

Conclusion 26

Appendix:

A. February 4, 1982, Opinion and May 20, 1982, Denial of Petition for Rehearing of the United States Court of Appeals for the Eighth Circuit A-1

B. January 25, 1980, Order and Memorandum of the United States District Court for the Eastern District of Missouri A-29

C. September 19, 1980, Orders and Memorandum of the United States District Court for the Eastern District of Missouri A-39

D. Text of Constitutional Provision, Statutes, and Regulations Involved A-45

E. Complaint filed in United States District Court for the Eastern District of Missouri on August 27, 1979 ..... A-60

TABLE OF AUTHORITIES

Cases

Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).. 10,22

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 13,14

Board of Education of the Hendrick Hudson Cent. School Dist. v. Rowley, No. 80-1002 (U.S. June 28, 1982). 16

Brown v. General Services Administration, 425 U.S. 820 (1976).....15,16,17

Edelman v. Jordan, 415 U.S. 651 (1974).....7,n.2,18,19,26

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 13,14

Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945) 19

Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D. Ga. 1981)..... 12

Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979) 17

Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 19

Kennecott Copper Corp. v. State Tax Comm'r, 327 U.S. 573 (1946) 19

Maine v. Thiboutot, 448 U.S. 1 (1980) 8

Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982) 2,7,n.2,8, 9,10,18

Miener v. Missouri, 498 F.Supp. 944 (E.D. Mo. 1980) .. 2,6

Miener v. Missouri, 498 F.Supp. 949 (E.D. Mo. 1980) .. 2,7

Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977).....8,18,19,20,26

Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980)..... 12

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) .. 14

Constitutional Provision

U.S. Const. amend. XI 7,n.2,8,18,19,26

Statutes

Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1976) 13

Securities Exchange Act of 1934, §§ 17(a), 18(a), 15 U.S.C. §§ 78q(a), 78r(a) (1976) 14

Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, 1411-1420 (1976 & Supp. IV 1980) 4,9

20 U.S.C. § 1401(18) (1976) 20

20 U.S.C. § 1412(1), (2)(B), (C), (6) (1976) 20,21

20 U.S.C. § 1414(a)(1)(A), (C)(ii), (D), (5) (1976) 21,25

20 U.S.C. § 1414(d) (1976) 21,22,24,25,26

20 U.S.C. § 1415 (1976) 6,11,12,14,16,17

20 U.S.C. § 1415(b)(1)(C), (E) (1976) 10,11,16,17,20

20 U.S.C. § 1415(b)(2) (1976) 11,16

20 U.S.C. § 1415(d) (1976) 16

20 U.S.C. § 1415(e)(2) (1976) 7,9,10,16

20 U.S.C. § 1415(e)(3) (1976) 16

20 U.S.C. § 3441(a)(1) (Supp. IV 1980) 20

28 U.S.C. § 1254(1) (1976) 2

Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (Supp. IV 1980) 5,6,7,8,9,11,12,14,16,17,18

42 U.S.C. § 1983 (Supp. IV 1980) 6,7,8,9,17,18

42 U.S.C. § 1985(3) (Supp. IV 1980) 17

Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) (1976) 17

Civil Rights Act of 1964, § 717, 42 U.S.C. § 2000e-16 (1976 & Supp. IV 1980) 15,16

Civil Rights Act of 1964, § 717(c), 42 U.S.C. § 2000e-16(c) (1976) 15

Mo. Rev. Stat. § 46.040 (1978) 4

Mo. Rev. Stat. § 162.670-.995 (1978 & Supp. 1981)..... 20

Mo. Rev. Stat. § 162.675(2), (3), (4) (1978)..... 23,25

Mo. Rev. Stat. § 162.700(1) (1978)..... 23,24

Mo. Rev. Stat. § 162.700(3) (1978)..... 24

Mo. Rev. Stat. § 162.725(1) (1978)..... 23,24

Mo. Rev. Stat. § 162.725(3) (1978)..... 24

Mo. Rev. Stat. § 162.730(1) (Supp. 1981)..... 23

Mo. Rev. Stat. § 162.735 (1978)..... 23,24

Mo. Rev. Stat. § 162.740 (Supp. 1981)..... 24,25

Mo. Rev. Stat. § 162.815 (1978)..... 4

Mo. Rev. Stat. § 162.890 (1978)..... 24

Act of June 18, 1957, § 1, 1957 Mo. Laws 416..... 4

Rules and Regulations

17 C.F.R. § 240.10b-5 (1981)..... 13

34 C.F.R. §§ 104.31-.39 (1981)..... 16

34 C.F.R. § 104.33(b)(2) (1981)..... 17

34 C.F.R. § 104.35(d) (1981)..... 17

34 C.F.R. § 104.36 (1981)..... 17

34 C.F.R. pt. 300 (1981)..... 17

34 C.F.R. § 300.360(b) (1981)..... 22,23

34 C.F.R. § 300.512 (1981)..... 16

34 C.F.R. § 300.600(a) (1981)..... 20

Sup. Ct. R. 20.4..... 2

No. A-909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

BOARD OF EDUCATION OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

and

ALLAN G. BARCLAY, GERALD K. BRAZNELL, AND GERALD B. HANSEN, DIRECTORS OF THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI,

Petitioners,

v.

TERRI ANN MIENER, By and through her next friend and parent, Clyde J. Miener,

and

STATE OF MISSOURI, *et al.*,

and

THOMAS E. SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Special School District of St. Louis County, Missouri, the Board of Education of the Special School District, and Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District, pray that a writ of certiorari issue to review the judgment and opinion of

the United States Court of Appeals for the Eighth Circuit entered on February 4, 1982, affirming in part and reversing and remanding in part the Orders of the United States District Court for the Eastern District of Missouri entered on January 25, 1980, and September 19, 1980. Petitioners believe that on the two questions presented herein, the Eighth Circuit's judgment was in conflict with decisions of this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals is published at 673 F.2d 969 (8th Cir. 1982), and is reprinted herein as Appendix A. The Memoranda of the District Court of January 25, 1980, and September 19, 1980, are published, respectively, at 498 F. Supp. 944 (E.D. Mo. 1980) and 498 F. Supp. 949 (E.D. Mo. 1980), and are reprinted herein as Appendixes B and C.

JURISDICTION

The judgment of the Eighth Circuit of which review is sought was entered on February 4, 1982. On April 27, 1982, Mr. Justice Blackmun extended until June 4, 1982, the time within which Petitioners could seek a writ of certiorari. Also on April 27, 1982, for extraordinary reasons, the Eighth Circuit ordered that Petitioners might have until May 11, 1982, to file a petition for rehearing. (The grounds on which the Eighth Circuit's order was sought were described in detail in the Application for Extension of Time Within Which to File a Petition for Writ of Certiorari which Petitioners mailed to Mr. Justice Blackmun on April 24, 1982.) Pursuant to the permission granted by the Eighth Circuit, Petitioners submitted a Petition for Rehearing on May 11, 1982, and this Petition was denied on May 20, 1982. Thereupon, under Supreme Court Rule 20.4, the ninety-day period for filing a petition for certiorari began to run anew and superseded the extension previously allowed by Mr. Justice Blackmun.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

The following constitutional provision, statutes, and regulations involved in this case are set out in Appendix D:

U. S. Constitution Amendment XI

20 U.S.C. §1401(18), (19) (1976)

20 U.S.C. §1412(1), (2)(A), (B), (C), (6) (1976)

20 U.S.C. §1414(a)(1)(A), (C)(ii), (D), (5) (1976)

20 U.S.C. §1414(d) (1976)

20 U.S.C. §1415 (1976)

29 U.S.C. §794 (Supp. IV 1980)

34 C.F.R. §300.360(a), (b) (1981)

34 C.F.R. §300.512 (1981)

34 C.F.R. §300.600 (1981)

Mo. Rev. Stat. §162.675(2), (3), (4) (1978)

Mo. Rev. Stat. §162.700(1), (3) (1978)

Mo. Rev. Stat. §162.725(1), (3) (1978)

Mo. Rev. Stat. §162.730(1) (Supp. 1981)

Mo. Rev. Stat. §162.735 (1978)

Mo. Rev. Stat. §162.740 (Supp. 1981)

Mo. Rev. Stat. §162.815 (1978)

Mo. Rev. Stat. §162.890 (1978)

STATEMENT OF THE CASE

This action was commenced on August 27, 1979, by Terri Ann Miener, a severely handicapped 17 year old girl. At the time of the Complaint, Plaintiff was and had been for over two years a voluntary resident of the Youth Center of the St. Louis State Hospital, located in the City of St. Louis. Suing through her father, Clyde J. Miener, a resident of St. Louis County,[1] Plaintiff sought declaratory, injunctive, and monetary relief for alleged violations of her constitutional, statutory, and common law rights. Defendants named in the suit were the State of Missouri and its governor, the State department of education and its commissioner and assistant commissioner, the State department of mental health and its commissioner and acting director, two local officials of the State department of mental health (who were sued both individually and in their official capacities), and Petitioners.

Petitioner Special School District of St. Louis County, Missouri, was created in 1957 by the voters of St. Louis County, pursuant to legislation authorizing the establishment of special districts to educate and train the handicapped children residing in certain populous counties. Act of June 18, 1957, § 1, 1957 Mo. Laws 416 (current version at Mo. Rev. Stat. § 162.815(1978)). In 1965 the St. Louis County voters expanded the responsibilities of the Special District to include the providing of vocational education to County students. During the 1980-81 school year, 14,522 handicapped students and 2,205 vocational education students were enrolled in programs of the Special District. Petitioner has received federal funds under the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. §§ 1401, 1411-1420 (1976 & Supp. IV 1980), every year since the 1977-78 school year.

---

[1] The City of St. Louis and St. Louis County are entirely separate geographic and political subdivisions of the State of Missouri. *See* Mo. Rev. Stat. § 46.040 (1978).

The Complaint in this case contained four counts, only the first two of which named Petitioners as defendants. Count I alleged that all Defendants had violated Plaintiff's right to a free appropriate public education under EAHCA. In Count II, Plaintiff alleged that the State educational Defendants and Petitioners had violated her due process and equal protection rights under the Fifth and Fourteenth Amendments of the United States Constitution by refusing to allow her to participate fully in the special education program operated by Petitioners. Plaintiff sought a preliminary and permanent injunction requiring Defendants to admit her to the programs of the Special School District. Count III alleged that the State and local mental health Defendants had discriminatorily denied Plaintiff's EAHCA right to a full education, in violation of her due process rights under the Fifth and Fourteenth Amendments, and, on the basis of Plaintiff's handicaps, had denied her equal access to facilities and programs, especially educational programs, open to others similarly situated, in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. IV 1980). Preliminary and permanent injunctions against future denials of equal access were sought. Count IV asserted a pendent claim for damages against the two local officials of the mental health department individually for injuries suffered by Plaintiff while in the care and custody of the St. Louis State Hospital.

In addition to the injunctive relief noted above, Plaintiff prayed for an award of $50,000.00 damages against all Defendants for deprivation of her civil and constitutional rights; for damages of $474,358.00 against the State, the two State departments, and the Special School District for violation of Plaintiff's statutory and civil rights to a full and adequate education; and for an injunction requiring the State and the two State departments "to provide prospective relief in the form of compensatory services to overcome the effects of any past denial of special educational services."

Discovery in this case proceeded apace, and it soon became apparent that the Special District's only contacts with Plaintiff prior to the suit had been the performance of evaluations on two occasions, participation of Special District personnel in the preparation of an individualized educational program (IEP) for Plaintiff in August, 1978, and the providing of limited "homebound" services to Plaintiff for a short time while she was a resident of the Youth Center. The Special District had never refused a request by Mr. Miener to provide educational services for his daughter.

On December 20, 1979, Petitioners filed two motions for summary judgment, one regarding Petitioners' liability for damages and the other regarding Petitioners' duties to Plaintiff. On January 25, 1980, the District Court granted in part the other Defendants' motions to dismiss, holding that (1) there was an implied private right of action to enforce Section 504 of the Rehabilitation Act, but no implied action for damages under the section, (2) the express remedy set out in Section 1415 of EAHCA was the sole remedy for violation of the Act and Congress had not implied a private action for damages, and (3) the discrimination alleged in Counts II and III of the Complaint was not the kind of "invidious discrimination" necessary to support a claim for damages under 42 U.S.C. § 1983. *Miener* v. *Missouri*, 498 F.Supp. 944 (E.D. Mo. 1980). On March 14, 1980, the District Court denied Petitioners' two motions for summary judgment as moot.

On April 23, 1980, the Court adopted a stipulation of the parties, pursuant to which Plaintiff dismissed with prejudice all remaining claims except the claim for compensatory education and the pendent tort claim.

On September 4, 1980, Petitioners filed another motion for summary judgment, contending that, because Plaintiff was a resident of the City of St. Louis, Petitioners had no obligation to her under federal or State law, except to contribute toward

her education an amount determined by State laws. In its decision of September 19, 1980, the District Court dismissed Plaintiff's two remaining claims. The Court held that the claim for compensatory education, although phrased as a prayer for injunctive relief, was in essence a claim for damages and would therefore be dismissed in accordance with the Court's Order of January 25, 1980. Since all federal claims had been dismissed, the pendent tort claim was also dismissed. *Miener* v. *Missouri*, 498 F.Supp. 949 (E.D. Mo. 1980). Petitioners' motion for summary judgment was held moot.

Plaintiff appealed, contending that the District Court had erred in (1) finding that a private action for damages was not implied under Section 504 of the Rehabilitation Act, (2) finding that a private action for damages was not implied under Section 1415(e)(2) of EAHCA, (3) dismissing Plaintiff's 42 U.S.C. § 1983 claim, and (4) characterizing Plaintiff's claim for compensatory education as a damages claim barred by the Eleventh Amendment.[2]

On Februarv 4, 1982, the Eighth Circuit delivered its opinion, affirming in part and reversing and remanding in part the two Orders of the District Court dismissing Plaintiff's claims. The Court of Appeals affirmed the court below on the absence of an action for damages under EAHCA, but only after determining that the "appropriate relief" that a court is authorized to grant under Section 1415(e)(2) of EAHCA does not include

---

[2] For some reason, both Plaintiff and the Eighth Circuit thought that the District Court had dismissed the compensatory education claim on Eleventh Amendment grounds. *See Miener* v. *Missouri*, 673 F.2d 969, 973, 980 (8th Cir. 1982); Brief of Appellant at 34, *id.* Although the District Court did include a quotation from *Edelman* v. *Jordan*, 415 U.S. 651 (1974), in its Memorandum of September 19, 1980, the Memorandum makes it perfectly clear that the reason for the dismissal was that the compensatory education claim, being a claim for damages, fell within the scope of the Court's earlier decision on January 25, 1980.

monetary relief. *Miener* v. *Missouri*, 673 F.2d 969, 979-80 (8th Cir. 1982). In regard to the implication of a private action for damages under Section 504 of the Rehabilitation Act, however, the Eighth Circuit found that the regulations thereunder provided only administrative sanctions against recipients of federal funds for acts of discrimination and did not afford an adequate remedy to the handicapped individuals who were objects of the discrimination. Therefore, the Court held that a private action for damages was implied in Section 504 to vindicate the individual rights that Congress had created. *Id.* at 977-78.

On the prayer for compensatory educational services, the Court of Appeals agreed with the District Court that this was a claim for damages. The Eighth Circuit chose, however, to expand the District Court's purported consideration of the Eleventh Amendment to all defendants and all claims in the case. The Court concluded that the State, the two State departments, and the officials thereof sued in their official capacity were immune from suit for damages by virtue of the Amendment. Largely in reliance on *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274, 280 (1977), the Eighth Circuit held that Petitioners did not share the State's immunity under the Amendment. Therefore, the Court "reverse[d] the dismissal of appellant's cause of action for damages *under the Rehabilitation Act* against these defendants." 673 F.2d at 983 (emphasis added). The Court "also reverse[d] the dismissal of appellant's § 1983 cause of action as asserted against the various Special School District defendants," *id.*, and remanded that claim for reconsideration in light of *Maine* v. *Thiboutot*, 448 U.S. 1 (1980).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Contravened Relevant Decisions Of This Court In Holding That A Special Public School District Which Receives Federal Funds Under The Education For All Handicapped Children Act Of 1975 (EAHCA) Can Be Sued For Damages Under The Implied Right Of Action In Section 504 Of The Rehabilitation Act Of 1973 And Under 42 U.S.C. § 1983 By A Handicapped Child Alleging Wrongful Exclusion From The District's Programs, When No Recovery Of Damages Is Possible Under The Express Remedies Provided In EAHCA.

Discussion of this issue must begin with an examination of the Eighth Circuit's holding that a private action for damages is not available under the Education for All Handicapped Children Act of 1975 (EAHCA). The Court's analysis of this question properly focused on Section 1415(e)(2) of the Act, which provides:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant *such relief as the court determines is appropriate.*

20 U.S.C. § 1415(e)(2) (1976) (emphasis added). The Court defined the issue as whether Congress intended the phrase "such relief as the court determines is appropriate" to include an award of damages. *Miener* v. *Missouri,* 673 F.2d at 979.

Relying on the reasoning of the Seventh Circuit in *Anderson* v. *Thompson*, 658 F.2d 1205, 1210-13 (7th Cir. 1981), the Court observed that "[t]he provision for suit in district court caps an entire sequence of procedures aimed at ensuring proper placements and programs for handicapped children," and given this context, "appropriate relief was generally intended to be restricted to injunctive relief, within which the district judge would have wide latitude to fashion an individualized educational program for the child." 673 F.2d at 979. The Eighth Circuit found "little support for a damage remedy" in the legislative history of the Act, *id.*, and the *Anderson* court found that "the overriding congressional concern was meeting the needs of handicapped children" and that "Congress was also concerned about the lack of money available for education," 658 F.2d at 1212. The Seventh Circuit also observed that it would not be good policy to penalize a school district which was attempting in good faith to provide an appropriate education to a handicapped child if it later turned out that a different program should have been provided. *Id.* at 1213. Perceiving that "educational programs for the handicapped will suffer if school officials, for fear of exposing themselves to monetary liability for incorrect placements, hesitate to implement innovative educational reforms," the Seventh Circuit concluded that "implying a general damage remedy would hinder rather than help the very children for whose benefit the statute was enacted." *Id.* (footnote omitted). For similar reasons, the Eighth Circuit held that monetary relief was not available under Section 1415(e)(2) of EAHCA. 673 F.2d at 979.

The Eighth Circuit in the present case and the Seventh Circuit in *Anderson* thus concluded that Congress did not intend a handicapped child or his parent to be able to recover damages from a provider of special education for any grievance that could be handled through the procedures established in Section 1415. The scope of those procedures is defined in Section 1415(b)(1), which provides in part as follows:

The procedures required by this section shall include, but shall not be limited to—

. . . .

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) *refuses to initiate* or change,

the identification, evaluation, or educational placement of the child or *the provision of a free appropriate public education to the child;*

. . . .

(E) an opportunity to present complaints with respect to *any matter relating to* the identification, evaluation, or educational placement of the child, or *the provision of a free appropriate public education to such child.*

20 U.S.C. § 1415(b) (1976) (emphasis added). The filing of such a complaint initiates the hearing and court procedures described at length in the remainder of Section 1415. In the present case, the gravamen of Plaintiff's Complaint insofar as Petitioners are concerned is that she was wrongfully excluded from the special education programs of the Special School District. Such a complaint clearly falls within the above-emphasized statutory language of Section 1415(b)(1)(E), as amplified in Section 1415(b)(1)(C). Thus, Plaintiff's grievance was of the type which Congress intended to be resolved through the procedures of Section 1415 and which Congress did *not* intend to eventuate in a possible damages award.

By holding that the present Plaintiff can bring an implied action for damages against Petitioners under Section 504 of the Rehabilitation Act, the Eighth Circuit has made possible wholesale circumvention of the legislative intent which the Court itself found to be expressed in Section 1415 of EAHCA. The relevant part of Section 504 provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794 (Supp. IV 1980). The Eighth Circuit's holding would allow any handicapped child or his parent who was dissatisfied with the child's IEP to bring an action for damages under Section 504 by alleging that because of the difficulty of dealing with the child's handicap, the provider of special education had intentionally formulated an IEP that did not address the unique nature of the handicap and had thus denied the child the benefits of a public education. This possibility is not at all remote or far-fetched. *See, e.g., Georgia Ass'n of Retarded Citizens* v. *McDaniel.* 511 F. Supp. 1263, 1279-81 (N.D. Ga. 1981) (alternative holding) (statewide practice of not providing special educational services to handicapped children for more than regular 180-day school year violated Section 504 by preventing individual consideration of needs of each handicapped child). *See also Tatro* v. *Texas,* 625 F. 2d 557, 564 (5th Cir. 1980).

The Eighth Circuit's holdings in the present case are necessarily premised on findings that the intent of Congress in 1973 when it passed the Rehabilitation Act was that a handicapped child or his parent be able to sue a school district for damages for wrongs relating to the provision of special education, but that in 1975 when Congress enacted EAHCA its intent was the precise opposite. If such a change in congressional intent actually occurred, then the Eighth Circuit should have restricted Plaintiff to her remedy under Section 1415 of EAHCA, since that remedy was the more recently enacted, was more specifically directed towards the education of handicapped children, and was provided by Congress, not judicially created.

Decisions of this Court over the past decade provide ample precedent for limiting the scope of a judicially implied action when necessary to prevent evasion or negation of the conditions, substantive or procedural, that Congress has included in a corresponding express right of action. In *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), the Court upheld the *Birnbaum* rule, which provides that only actual purchasers or sellers of a security can bring a (judicially implied) private action for damages under Section 10(b) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78j(b) (1976), and Rule 10b-5 issued thereunder, 17 C.F.R. § 240.10b-5 (1981). As one step in its reasoning the Court noted that the principal express private remedies which Congress created contemporaneously with Section 10(b) in the Securities Act of 1933 (1933 Act) and in the 1934 Act were all limited to purchasers or sellers of securities. The Court commented that

> [i]t would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.

Id. at 736 (footnote omitted).

This Court employed a similar step in its reasoning in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), in holding that an element of the implied private action under Section 10(b) and Rule 10b-5 was scienter—*i.e.* intent to deceive, manipulate, or defraud—on the part of defendant. Noting that the express provisions in the 1933 and 1934 Acts which impose civil liability on the basis of defendant's mere negligence were "subject to significant procedural restrictions not applicable under § 10(b)," *id.* at 208-09 (footnote omitted), the Court drew the following conclusion:

> [T]hese procedural limitations indicate that the judicially created private damages remedy under §10(b)—which has no comparable restrictions—cannot be extended, con-

> sistently with the intent of Congress, to actions premised on negligent wrongdoing. Such extension would allow causes of action covered by §§11, 12(2), and 15 [the sections expressly premising liability on negligence] to be brought instead under §10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions.

Id. at 210 (footnotes omitted). The issues in *Blue Chip Stamps* and *Hochfelder* are closely analogous to the issue in the present case, and the holdings in those cases indicate that the Eighth Circuit should not have allowed Plaintiff to evade the limitation of the *express* remedy under Section 1415 of EAHCA to injunctive relief by bringing the same claim against Petitioners by way of an *implied* action for damages under Section 504.

The same principle was illustrated in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979), in which this Court found that no private right of action was implied in the reporting and record keeping requirements of Section 17(a) of the 1934 Act, 15 U.S.C. § 78q(a) (1976). Considering the express remedy provided in Section 18(a) for misrepresentations in filed reports, the Court stated as follows:

> [W]here the principal express civil remedy for misstatements in reports created by Congress contemporaneously with the passage of §17(a) is by its terms limited to purchasers and sellers of securities, we are extremely reluctant to imply a cause of action in §17(a) that is significantly broader than the remedy that Congress chose to provide.

442 U.S. at 574.

In at least two cases where an express remedy for violation of a statute was particularly detailed and comprehensive, comprising both administrative and judicial proceedings, this Court has held that the express provision constitutes the exclusive private

remedy, preempting all more general remedies, express or implied. In *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), a federal employee alleging racial discrimination had filed suit in federal district court more than 30 days after receiving notice of final agency action, and thus failed to comply with Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e—16(c) (1976). This Court affirmed the dismissal of the complaint on the grounds that Section 717 "provide[d] the exclusive judicial remedy for claims of discrimination in federal employment." 425 U.S. at 835. Examining the remedy provided by Congress in Section 717, the Court concluded as follows:

> The balance, completeness, and structural integrity of §717 are inconsistent with the petitioner's contention that the judicial remedy afforded by §717(c) was designed merely to supplement other putative judicial relief. . . . *[U]nlike these other supposed remedies, §717 does not contemplate merely judicial relief. Rather it provides for a careful blend of administrative and judicial enforcement powers.* . . . The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." *Preiser* v. *Rodriguez*, 441 U.S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

Id. at 832-33 (footnote omitted; emphasis added). It was also noted that "[i]n a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." *Id.* at 834.

Petitioners submit that the preceding quotation from *Brown* is directly applicable in its entirety to the present case. In *Board of Education of the Hendrick Hudson Cent. School Dist.* v. *Rowley*, No. 80-1002, slip op. at 28-29 (U.S. June 28, 1982), this Court found that the "elaborate and highly specific procedural

safeguards embodied in § 1415" of EAHCA were seen by Congress as the prime means of ensuring that each handicapped child receive a "free appropriate public education." Like Section 717 of the Civil Rights Act, Section 1415 of EAHCA contains a "careful blend of administrative and judicial" proceedings, beginning with an impartial due process hearing conducted by the local, intermediate, or State educational agency, continuing with an appeal to the State agency if the initial hearing was held at the local or intermediate level, and culminating in a civil action in State or federal court and appeals therefrom. All hearings are to be conducted by "impartial" officers, as defined in Section 1415(b)(2), and the rights of parties to the hearing are set out in Section 1415(d). The time limits for the administrative stages are stated in 34 C.F.R. § 300.512 (1981). The standard of proof, special procedures, and relief available in the court action are specified in Section 1415(e)(2). Finally, Section 1415(e)(3) provides for the educational placement of the handicapped child during the pendency of the hearings and civil action.

In contrast, the implied action under Section 504 of the Rehabilitation Act is, of course, strictly judicial and, if available to a parent of a handicapped child for grievances cognizable under Section 1415(b)(1)(E) of EAHCA, would permit the parent to sue directly and thus bypass the prerequisite administrative hearings and other procedural limitations provided by Congress in Section 1415 of EAHCA. Moreover, the implied remedy under Section 504 is, by the reasoning in *Brown*, a "more general remed[y]" that is subject to preemption insofar as complaints cognizable under Section 1415(b)(1)(E) of EAHCA are concerned.

On its face, Section 504 applies to *all* programs receiving federal financial assistance, not just educational agencies, and to *all* handicapped persons, not just handicapped children. The nine regulations issued under Section 504 relating to education programs that receive federal aid, 34 C.F.R. §§ 104.31-.39

(1981), take up only 3½ pages in the *Code of Federal Regulations* and merely provide an outline of the nearly two hundred regulations issued under EAHCA, which consume almost 100 pages in the *Code*. See 34 C.F.R. pt. 300 (1981). Moreover, several of the regulations under Section 504 provide that compliance with the corresponding section of EAHCA is one means, though not the only means, of satisfying the requirements of the regulations, and are therefore broader than the requirements of EAHCA. *See* 34 C.F.R. § 104.33(b)(2) (1981); *id.* § 104.35(d); *id.* § 104.36. In short, because of the "balance, completeness, and structural integrity" of the "precisely drawn, detailed" express remedy in Section 1415 of EAHCA and because of the more general nature of the implied remedy under Section 504, the reasoning of *Brown* compels the conclusion that the implied remedy under Section 504 was preempted as to the types of complaints specified in Section 1415(b)(1)(E) of EAHCA.

The *Brown* Court's reasoning was reaffirmed in *Great American Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979), in which the plaintiff attempted to bring an action under 42 U.S.C. § 1985(3) for conspiratorial deprivation of his rights under Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1976). The Court reasoned that Congress had created in Title VII a "detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversarial resolution of claims," 442 U.S. at 372-73, and

> [i]f a violation of Title VII could be asserted through [§1985(3)], a complainant could avoid most if not all of these detailed and specific provisions of the law.

Id. at 375-76. Accordingly, the Court held that "deprivation of a right created by Title VII cannot be the basis for a cause of action under [§1985(3)]." *Id.* at 378. The *Novotny* holding, like that in *Brown*, requires the dismissal in this case of Plaintiff's claims against Petitioners under Section 504 and 42 U.S.C. § 1983.

In summary, the relevant decisions of this Court required the Eighth Circuit to affirm on two grounds the dismissal of Plaintiff's damages claims against Petitioners: (1) Plaintiff cannot recover damages in an implied action when the remedy available for the same claim in an action expressly created by Congress does not include monetary relief; and (2) the remedy expressly provided by Congress for complaints relating to the education of handicapped children preempted all more general remedies, including the implied action under Section 504 of the Rehabilitation Act and 42 U.S.C. § 1983, and does not allow the recovery of damages. Because the Eighth Circuit's holdings were contrary to these two propositions, this Court should grant certiorari to review the judgment.

II. The Court Of Appeals Incorrectly Applied This Court's Decisions In *Edelman* v. *Jordan* And *Mt. Healthy City School District* v. *Doyle* In Holding That A Special Public School District Which Receives Federal Funds Under The Education For All Handicapped Children Act And Whose Sole Functions Are The Education Of Handicapped Children And The Providing Of Vocational Education Does Not Share The State's Eleventh Amendment Immunity From Suit For Damages Regarding The District's Provision Of Education To The Handicapped.

The Court of Appeals relied entirely on *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274 (1977), in holding that "[t]he eleventh amendment . . . does not preclude the award of damages against the Special School District" Defendants. 673 F.2d at 980. Petitioners contend that this reliance was misplaced and that the rule applicable to the facts of the present case was stated in a section of *Edelman* v. *Jordan* on which the Eighth Circuit did not rely.

The Court in *Mt. Healthy* was faced with the issue whether the board of education of a local school district "is to be treated

as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." 429 U.S. at 280. Examining "the nature of the entity created by state law," the Court found that local school districts in Ohio receive some guidance and substantial financial assistance from the State, but have the power to issue bonds and to levy taxes. The Court concluded that a local school board "is more like a county or city than it is like an arm of the State" and therefore is not shielded by the Eleventh Amendment from suit in federal court. *Id.* at 280-81.

The Court in *Mt. Healthy* found it unnecessary to discuss general rules determining when the Eleventh Amendment applies. In *Edelman* v. *Jordan,* however, the principle which should govern the present case was clearly set out. After quoting a passage from *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459, 464 (1945), the Court stated as follows:

> Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

415 U.S. at 663 (citing *Great Northern Life Ins. Co.* v. *Read,* 332 U.S. 47 (1944), and *Kennecott Copper Corp.* v. *State Tax Comm'r,* 327 U.S. 573 (1946)). Reconciling the *Mt. Healthy* decision with this general rule is a relatively simple matter, for it is difficult to conceive how a damages award against an ordinary local school district could be paid out of the State treasury. There is simply no mechanism by which the liability of the local district would be transferred to the State.

The situation of the Special School District, however, differs radically, both factually and legally, from that of the local school district in *Mt. Healthy.* In the first place, the Special District does not offer a program consisting of regular-curriculum courses; all its students are either handicapped

children in need of special educational services or nonhandicapped high school juniors or seniors who choose to enroll in a vocational education program. During the 1980-81 school year, the number of handicapped students exceeded the number taking vocational courses by a ratio of almost 7 to 1. The total number of handicapped students was large: 14,522. If the Eighth Circuit's holding in this case, which would allow a handicapped child or his parent to sue for damages in regard to one of the matters listed in Section 1415(b)(1)(E) of EAHCA, is not reversed, the potential liability of Petitioners would be staggering, both in absolute terms and compared to the potential liability of typical local school districts.

In addition to factual differences between the Special District and the local school board in *Mt. Healthy*, the legal relations between the Special District and the State of Missouri under both EAHCA and the Missouri statutes governing the provision of special educational services to handicapped children, Mo. Rev. Stat. §§ 162.670-.995 (1978 & Supp. 1981), make the *Mt. Healthy* holding inapplicable in the present case and compel the conclusion that Petitioners are entitled to the protection of the Eleventh Amendment. As one of many preconditions to the receipt of federal funds under EAHCA, a State must demonstrate to the Secretary of Education that the "State educational agency" will bear the ultimate responsibility for carrying out EAHCA's requirements and for supervising all educational programs for handicapped children within the State to ensure they meet educational standards established by the State agency. 20 U.S.C. §§ 1412(6), 3441(a)(1) (1976 & Supp. IV 1980); *see* 34 C.F.R. § 300.600(a) (1981). Other preconditions are that the State have in effect a policy that guarantees a "free appropriate public education," as defined in 20 U.S.C. § 1401(18) (1976), to each handicapped child in the State, *id.* § 1412(1), and that the State have developed a plan describing the steps taken by the State to assure, *inter alia*, the location and evaluation of all handicapped children in the State, regardless of the severity of their handicap, and the provision of a free ap-

propriate public education to all these children by dates specified in the Federal Act, *id.* § 1412(2)(B), (C).

In order to receive EAHCA funds, a local educational agency such as the Special District must submit to the State agency an application assuring that EAHCA payments would be spent for programs to locate and evaluate all handicapped children within its jurisdiction, to establish a goal of providing such children a free appropriate public education, and to set up a detailed timetable for accomplishing this goal. *Id.* § 1414(a)(1)(A), (C)(ii), (D). The application must also provide assurances that the local agency will prepare and revise an IEP for each handicapped child at least once a year. *Id.* § 1414(a)(5).

The provisions directly relevant to the question whether a damages award against Petitioners would be paid from the State treasury are contained in Section 1414(d), which provides in part:

> Whenever a State educational agency determines that a local educational agency—
>
> (1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section; [or]
>
> . . . .
>
> (3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;
>
> the State education agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner,

> and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

As mentioned above, the Special School District provided special educational services to more than 14,500 handicapped children during the 1980-81 school year. If only a handful of these students were to win damage awards against the District in any given year,[3] Petitioners' liability could be enormous and would, in any event, seriously deplete the resources available for special education. The shortage of funds could, for example, result in the inability to perform annual revisions of 15,000 IEP's or to provide for the needs of the most severely handicapped. In whatever form the deficit is manifested, Section 1414(d) places upon the State educational agency responsibility for making up the shortfall.

One of the regulations implementing EAHCA indicates that the State agency's responsibility under Section 1414(d) may be met in several ways:

> In meeting the requirements of [Section 1414(d)], the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

---

[3] Petitioners note that if they are exposed to suits for damages, the certainty that damages will be awarded in some cases implies no dereliction of their duty to educate handicapped children. As the Seventh Circuit observed in *Anderson* v. *Thompson*:

> [I]n as new and undeveloped a field as special education, there is a need for flexibility and experimentation in programming for handicapped children. We take judicial notice of the fact that at the present time, problems of classification and treatment abound. Disagreements will arise and errors will be made.

658 F.2d at 1213.

34 C.F.R. § 300.360(b) (1981). Although the Missouri statutes governing the education of the handicapped do not expressly address the situation where a special school district lacks the funds to provide an appropriate education for all its students, a general analysis of the statutes indicates that the State would become responsible for the Special District's "severely handicapped" students. Section 162.675 of the Missouri Revised Statutes defines "handicapped children" as follows:

> As used in sections 162.670 to 162.995, unless the context clearly indicates otherwise, the following terms mean:
>
> . . . .
>
> (2) "Handicapped children", children under the age of twenty-one years who have not completed an approved high school program and who, because of mental, physical, emotional or learning problems, require special educational services in order to develop to their maximum capacity . . . .

Mo. Rev. Stat. § 162.675(2) (1978). "Severely handicapped children" are then defined as a subclass of "handicapped children," who, "because of the extent of the handicapping condition..., are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children." *Id.* § 162.675(3).

In general, Section 162.700(1) requires each local school district in the State to provide "special educational services," as defined in Section 162.675(4), to each handicapped child residing in the district. If the local district is unable to provide its "severely handicapped" children with programs that meet standards set by the State board of education, then Section 162.725(1) requires the State board to educate those children, either in "state schools for severely handicapped children" established pursuant to Section 162.730, or by contract with another public or private agency, as authorized in Section

162.735. In such a case, the local district becomes obligated to "pay toward the cost of the education of the child an amount equal to the average sum produced per child by the local tax effort of the district." Mo. Rev. Stat. § 162.740 (Supp. 1981). Where a special school district has been formed, however, the allocation of responsibility changes. The special district must provide special educational services to all handicapped and severely handicapped children residing in the local districts that make up the special district, *id.* §§ 162.700(1), (3), .725(3), and the State and local districts are relieved of any responsibility within the area served by the special district. *See id.* § 162.890.

Since there is no express provision applicable in the event of a determination against a special district under Section 1414(d) of EAHCA, it is most likely that the relevant Missouri statutes would be held to apportion the costs and responsibilities of educating the children whom the special district could no longer serve as if the special district had ceased to exist. The local districts of residence would become responsible for the "overflow" children. In St. Louis County, however, because the local districts have generally relied on the Special District for the education of handicapped and, in particular, severely handicapped children, and do not have adequate programs of their own, the responsibility for the severely handicapped would almost certainly be passed on to the State under Section 162.725(1). Furthermore, since the cost of providing special educational services to a severely handicapped child is several times greater than the cost for a less handicapped child,[4] and since the special district would almost certainly wish to continue providing appropriate educations for as many handicapped

---

[4] *See* p. 25 & note 6 *infra.*

children as possible,[5] the effect of a special district's shortage of funds occasioned by the payments of damages awards would be borne almost exclusively by the severely handicapped, for whom the State would become responsible.

In a case where the State educational agency is required by Section 1414(d) to assume responsibility for the provision of special education and related services, the Section provides that the State agency shall use the EAHCA funds that the local district otherwise would have received for that purpose. This amount, however, is negligible. During the 1980-81 school year, the Special School District received $205.00 in EAHCA funds for each handicapped child. In contrast, the Special District's average cost of providing special educational services for the year to a severely handicapped child, as defined in Mo. Rev. Stat. § 162.675(3) (1978), was $6,782.49.[6] The State agency would also be entitled to a contribution from the local district under Section 162.740. This sum will vary between districts, but in 1980-81, the average tax effort per pupil in the local districts of St. Louis County was $1,696.37. Assuming that the State would incur the same annual cost as the Special District for providing special education to a severely handicapped child, the State would have to pay an average net sum of $4,881.12 for each severely handicapped child to whom the Special District could no longer provide special educational services.

---

[5] It seems that this preference would be mandated by 20 U.S.C. § 1414(a)(1)(C)(ii) (1976), which requires that a local educational agency's priorities in providing a free appropriate public education be

> first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education . . . .

[6] In contrast, the District's average annual cost for a handicapped child who was not "severely handicapped" was $1,858.83.

In conclusion, if Petitioners are sued for damages for matters related to the provision of education to handicapped children, then the lion's share of such judgments as are returned would be passed on to the State via Section 1414(d) of EAHCA and the relevant Missouri statutes. This fact distinguishes the present case from *Mt. Healthy City School District* v. *Doyle* and makes the holding of that case inapplicable here. The rule stated in *Edelman* v. *Jordan* requires that Petitioners be held to have Eleventh Amendment immunity from suit for damages relating to their provision of special education to handicapped children. The judgment of the Eighth Circuit to the contrary should be reversed.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

BURTON M. GREENBERG
LONDON, GREENBERG & FLEMING
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102
(314) 231-8700
Counsel for Petitioners